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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 JAMES GROSS,

14 Plaintiff,

15 v.

16 SYMANTEC CORPORATION, et al.,

17 Defendants.

CASE NO.: C 12-00154 CRB

**SYMANTEC'S STATEMENT IN
SUPPORT OF FINAL APPROVAL
OF THE SECOND AMENDED
CLASS ACTION SETTLEMENT
AGREEMENT**

Date: March 14, 2014
Time: 10:00 AM

CONTENTS

I.	INTRODUCTION.....	1
II.	LEGAL STANDARD.....	2
III.	THE SETTLEMENT SHOULD BE APPROVED BECAUSE PLAINTIFF’S LAWSUIT LACKS MERIT	3
IV.	THE SETTLEMENT SHOULD BE APPROVED BECAUSE IT PROVIDES BENEFITS BETTER THAN OR EQUAL TO WHAT PLAINTIFF COULD HAVE OBTAINED HAD HE PREVAILED ON THE MERITS	5
V.	THE SETTLEMENT SHOULD BE APPROVED BECAUSE IT IS THE PRODUCT OF REPEATED NEGOTIATIONS AND REPEATED COURT INVOLVEMENT TO ENSURE ITS FAIRNESS	6
VI.	THE LACK OF ANY OBJECTORS OR INTERVENERS EVIDENCES THAT THE SETTLEMENT SHOULD BE APPROVED.....	9
VII.	CONCLUSION	10

AUTHORITIES

CASES

<i>Churchill Vill., L.L.C. v. GE</i> , 361 F.3d 566 (9th Cir. 2004).....	9
<i>Fraley v. Facebook, Inc.</i> , No. 11-1726 RS, 2013 WL 4516806 (N.D. Cal. Aug. 26, 2013).....	10
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998).....	2, 9
<i>In re Apple iPhone 4 Prods. Liab. Litig.</i> , No. 10-2188 RMW, 2012 WL 3283432 (N.D. Cal. Aug. 10, 2012).....	10
<i>In re Bluetooth Headset Prods. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011).....	8
<i>In re Omnivision Techs.</i> , 559 F. Supp. 2d 1036 (N.D. Cal. 2007)	9
<i>Lagarde v. Support.com, Inc.</i> , No. 12-609 JSC, 2013 WL 1283325 (N.D. Cal. Mar. 25, 2013)	8, 10
<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811 (9th Cir. Cal. 2012)	2
<i>Nigh v. Humphreys Pharmacal, Inc.</i> , No. 12-2714, 2013 WL 5995382 (S.D. Cal. Oct. 23, 2013)	4
<i>Parker v. Dish Network LLC</i> , No. 11-01457 PJH, ECF No. 70, at *1 (N.D. Cal. Mar. 9, 2012)	10
<i>Somers v. Apple, Inc.</i> , 258 F.R.D. 354 (N.D. Cal. 2009)	4
<i>Stearns v. Ticketmaster Corp.</i> , 655 F.3d 1013 (9th Cir. 2011).....	4
<i>Thompson v. Jiffy Lube Intern., Inc.</i> , 250 F.R.D. 607 (D. Kan. 2008).....	4
<i>Touhey v. United States</i> , No. 08-1418, 2011 WL 3179036 (C.D. Cal. July 25, 2011).....	10

RULES

Fed. R. Civ. P. 23(e).....	2
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I. INTRODUCTION

Defendant Symantec Corporation (“Symantec”) submits this statement in support of final approval of the parties’ settlement (the “Settlement”), which Settlement has been amended a second time in light of the Court’s instructions at the October 18, 2013 final approval hearing.¹ As instructed by the Court, the parties attended a settlement conference with Magistrate Judge Jacqueline Corley and were able to renegotiate their agreement to provide additional minimum monetary benefits to the Class regardless of the number of class members that submitted claim forms and regardless of any attorney fee award. Specifically, the Court observed at the October 18, 2013 hearing that, because of the low class member claims rate, Symantec could end up paying less than \$20,000 in monetary benefits to the Class if the Court approved the entire \$1.65 million fee award previously requested by Plaintiff’s counsel. Under the amended Settlement, Symantec has now agreed to provide the following benefits to class members:

- Payment of a minimum of \$1.25 million to class members in *cy pres* benefits, regardless of the number of claims submitted by class members and regardless of the fee award to Plaintiff’s counsel;
- Payment of a \$9.00 direct benefit to each individual class member who submits a valid claim form (equal to 30% of the purchase price of most of the products at issue and 90% of the purchase price of many of the products);
- Injunctive relief—including reprogramming of the software products at issue and development of new, revised product materials and messaging—that Plaintiff acknowledges will address the alleged misrepresentations at the heart of Plaintiff’s Second Amended Complaint; and
- A free, 3-month subscription to Symantec’s renowned Norton AntiVirus software (a product not at issue in the lawsuit) for every class member—regardless of whether

¹ The parties’ original Settlement Agreement was previously amended prior to preliminary approval in response to issues raised by the Court at the April 19, 2013 preliminary approval hearing. *See* ECF No. 68. The Settlement Agreement has now been amended a second time at the request of the Court at the October 18, 2013 final approval hearing.

1 they submit a claim form—with no obligation to provide credit card information
 2 and no automatic conversion to a paid subscription.

3 Given the benefits listed above; the weakness of Plaintiff’s case; the risk, expense,
 4 complexity, and likely duration of further litigation; the risk of maintaining class action status
 5 throughout trial; and the reaction of the class members to the proposed settlement, the amended
 6 Settlement is fair, adequate, and reasonable, and therefore appropriately approved.

7 **II. LEGAL STANDARD**

8 Class action settlements are properly approved if they are “fair, reasonable, and
 9 adequate.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. Cal. 2012) (quoting Fed. R. Civ.
 10 P. 23(e)). The Court “must evaluate the fairness of a settlement as a whole, rather than assessing
 11 its individual components.” *Id.* at 818-819 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
 12 1026 (9th Cir. 1998)). “[A] district court’s only role in reviewing the substance of [the]
 13 settlement is to ensure that it is ‘fair, adequate, and free from collusion.’” *Id.* (quoting *Hanlon*,
 14 150 F.3d at 1026-27). The factors that “guide the district court” in determining whether a
 15 settlement should be approved include “the strength of the plaintiffs’ case; the risk, expense,
 16 complexity, and likely duration of further litigation; the risk of maintaining class action status
 17 throughout the trial; the amount offered in settlement; the extent of discovery completed and the
 18 stage of the proceedings; the experience and views of counsel; the presence of a governmental
 19 participant; and the reaction of the class members to the proposed settlement.” *Id.* at 819.

20 “[T]he question whether a settlement is fundamentally fair within the meaning of Rule
 21 23(e) is different from the question whether the settlement is perfect in the estimation of the
 22 reviewing court.” *Id.* at 819. “[T]hat the settlement could have been better . . . does not mean
 23 the settlement presented was not fair, reasonable or adequate.” *Hanlon*, 150 F.3d at 1027.
 24 “Settlement is the offspring of compromise” and the court should not attempt to determine
 25 “whether the final product could be prettier, smarter or snazzier.” *Id.* “As the ‘offspring of
 26 compromise,’ . . . settlement agreements will necessarily reflect the interests of both parties to
 27 the settlement, including those of the defendant . . . and defendants can certainly be expected to
 28 structure a settlement in a way that does the least harm to their interests.” *Lane*, 696 F.3d at 821.

1 **III. THE SETTLEMENT SHOULD BE APPROVED BECAUSE PLAINTIFF'S**
 2 **LAWUIT LACKS MERIT**

3 The first three factors to be considered by the Court—"the strength of the plaintiffs'
 4 case"; "the risk, expense, complexity, and likely duration of further litigation"; and "the risk of
 5 maintaining class action status throughout the trial"—all favor approval of the Settlement.

6 The Settlement is an excellent result in this action for the Class because Plaintiff's case is
 7 particularly weak, would not likely survive summary judgment, and may not be maintainable as
 8 a class action through trial. Plaintiff alleges that certain Symantec software products, which
 9 (among other things) are designed to scan a computer system and identify and fix errors in the
 10 computer's registry, make misleading representations about the condition of the computer
 11 registry in order to persuade those who use the trial version to purchase the full product versions.
 12 *See* ECF No. 50 ¶¶ 1-4. Plaintiff does not dispute that the products at issue had value to class
 13 members; he contends only that the products were "overhyped" because "they didn't do all that
 14 the defendants represented they would do." ECF No. 79 at 3:23-4:3. Plaintiff's allegations of
 15 "overhyping" are without merit and not cognizable. Even if his Second Amended Complaint
 16 could survive the pending motion to dismiss (his original complaint was voluntarily withdrawn
 17 after Symantec moved to dismiss it, and his First Amended Complaint was dismissed with leave
 18 to amend), Plaintiff would not be able to avoid summary judgment and might not be able to
 19 maintain this action as a class action through trial.

20 No Misrepresentation. The alleged representations made by the products at issue are
 21 either statements of true facts or statements of a reasonable opinion based on true facts. The crux
 22 of Plaintiff's allegations appears to focus on the adjectives used by the products to describe the
 23 state of a user's computer. To the extent the products use adjectives to characterize the severity
 24 of the errors on a computer system, such as the adjectives "low system health" and "high priority
 25 errors," the products are expressing an opinion based on real data about the number of errors
 26 detected on a computer, the location of those errors in the computer system, and the frequency
 27 with which a user cleans errors from the computer. There is nothing deceptive about the manner
 28 in which the products diagnose the health of a computer system. As disclosed in the product

1 materials, each diagnosis reflects the opinion of Symantec that “[t]o maintain a healthy system,
2 the areas of your system that compromise your privacy need to be cleaned periodically and the
3 Registry and Disk kept free of errors.” Plaintiff will thus not be able to show that any false or
4 misleading representations were made by the products at issue.

5 No Injury. Plaintiff will also not be able to show that users have been harmed in any
6 way. Every user that purchased these products did so, presumably, to detect and clean errors
7 from their computer. And every user received exactly what they paid for: a product that detects
8 and cleans the unwanted errors from their system, errors that would otherwise have the potential
9 to decrease the performance of the computer system. Although Plaintiff disputes whether all
10 issues detected by the product are as severe as the software makes them out to be, Plaintiff does
11 not dispute that the product remedies certain issues it detects (e.g., empty registry keys).

12 Risk of Maintaining Class Action Status. Where defendants would challenge class
13 certification absent a settlement, “there is a risk that the Class may not be certified” that “weighs
14 in favor of settlement.” *Nigh v. Humphreys Pharmacal, Inc.*, No. 12-2714, 2013 WL 5995382
15 (S.D. Cal. Oct. 23, 2013). Here, the parties reached a Settlement prior to the filing of an
16 adversarial motion for class certification.² Although Symantec has stipulated to certification of
17 the Class for settlement purposes, absent settlement, Symantec would likely contest class
18 certification on all, or at least some, of Plaintiff’s claims if discovery revealed that class action
19 treatment is not appropriate. For example, Symantec would challenge class certification if the
20 evidence obtained during class certification discovery revealed (i) that only some class members
21 received the alleged misrepresentations, *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th
22 Cir. 2011); (ii) that class members have different computer systems with a different number of
23 errors of varying severity, *Thompson v. Jiffy Lube Intern., Inc.*, 250 F.R.D. 607, 621 (D. Kan.
24 2008); or (iii) that not all class members suffered the alleged damages, *Somers v. Apple, Inc.*, 258

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26
27 ² Plaintiff filed contemporaneously with his original complaint a “prophylactic” motion for
28 class certification. See ECF No. 2. That motion was entered and continued pending discovery.
See ECF No. 24.

1 F.R.D. 354, 361 (N.D. Cal. 2009). Accordingly, there is a genuine risk that this case could not
2 be maintained as a class action through trial, a risk that favors approval of the Settlement.

3 For these reasons, the Settlement should be approved because of the strong likelihood
4 that Symantec would prevail on Plaintiff's weak claims and because of the risk of maintaining
5 this action as a class action through trial.

6 **IV. THE SETTLEMENT SHOULD BE APPROVED BECAUSE IT PROVIDES**
7 **BENEFITS BETTER THAN OR EQUAL TO WHAT PLAINTIFF COULD HAVE**
8 **OBTAINED HAD HE PREVAILED ON THE MERITS**

9 The fourth factor to be considered by the Court, "the amount offered in settlement,"
10 favors approval of the Settlement because the Settlement provides better benefits than what
11 individual class members could have reasonably obtained by prevailing on the merits at trial.

12 \$9.00 Monetary Award. Each class member that submits a valid claim form under the
13 Settlement will receive a \$9.00 check—an amount that exceeds what each class member could
14 have received in damages had they been able to prevail on the merits of their claims at trial. As
15 discussed above, the Class has suffered no cognizable damages. And Plaintiff has not alleged
16 that the products purchased by class members were worthless, only that these products had
17 "diminished value" from allegedly exaggerating the "health" of a user's computer. ECF No. 71
18 at 8. Because the \$9.00 individual payment is an amount equal to 30% of the purchase price of
19 most of the products at issue and 90% of the purchase price of many of the products, even if a
20 jury were to conclude the products had "diminished value," class members would not likely
21 receive more than \$9.00 in damages. Indeed, even Plaintiff recognizes that "a recovery of \$9.00
22 (of the typical \$29.99 cost to consumers) is significant and represents nearly a complete recovery
23 on Plaintiff's claim that he and the Class overpaid for the Software." ECF No. 71 at 8.

24 3-Month Subscription to Norton AntiVirus. In addition to a monetary award, every class
25 member will be entitled to a free, 3-month subscription to the latest version of Symantec's
26 renowned Norton AntiVirus software—a benefit class members would not have received even
27 had they been able to prevail on their claims at trial. Regardless of whether they have submitted
28 a claim form, each class member will receive a link to activate a subscription to the newest
version of Norton AntiVirus software. Norton AntiVirus is a separate product that is not at issue

1 in the litigation; Plaintiff has made no allegations whatsoever about its efficacy or quality. A
 2 one-year subscription to this latest version of Symantec's flagship consumer product currently
 3 retails for \$49.99. Further, class members will receive their free 3-month subscription with no
 4 obligation to provide personal information or credit card information, and the subscription will
 5 not automatically convert to a paid subscription at the end of the 3-month period.

6 \$1.25 Million Cy Pres Award. Symantec will pay a minimum of \$1.25 million to *cy pres*
 7 recipients, regardless of the number of claims submitted by class members and regardless of any
 8 fee award to Class Counsel. To the extent the Court awards less than the \$700,000 fee award
 9 sought by Class Counsel, Symantec will pay an additional amount to these *cy pres* recipients
 10 equal to the difference between \$700,000 and the actual Fee Award approved by the Court.

11 Injunctive Relief. Finally, and at significant cost and effort to Symantec, Symantec has
 12 agreed to injunctive relief as part of the Settlement that will eliminate the alleged
 13 misrepresentations at the heart of Plaintiff's Second Amended Complaint. Symantec has agreed
 14 to reprogram the software products at issue to eliminate the language that was of concern to
 15 Plaintiff. Symantec will also develop revised product materials that explain the function of the
 16 products. Plaintiff agrees that these product changes "ensure that any user who chooses to
 17 purchase the Software Products in the future will do so fully informed and without any
 18 misconceptions of what the Products can and cannot do." ECF No. 71 at 7.

19 Given the weakness of Plaintiff's claims, the benefits of the Settlement described above
 20 exceed any recovery the Class could reasonably have hoped to obtain by prevailing on the merits
 21 of this weak case. The consideration offered by Symantec under the Settlement therefore favors
 22 approval of the Settlement.

23 **V. THE SETTLEMENT SHOULD BE APPROVED BECAUSE IT IS THE**
 24 **PRODUCT OF REPEATED NEGOTIATIONS AND REPEATED COURT**
INVOLVEMENT TO ENSURE ITS FAIRNESS

25 The fifth and six factors to be considered by the Court—"the extent of discovery
 26 completed and the stage of the proceedings" and "the experience and views of counsel"—favor
 27 approval of the Settlement because the Settlement is the product of two and half years of
 28 litigation and repeated rounds of mediation between experienced counsel.

1 Pre-Filing Attempts to Resolve the Dispute. Prior to filing the lawsuit, Plaintiff had
2 already obtained the core of the discovery that would be relevant to his claims: an alleged expert
3 analysis about how the software at issue operated and the representations made by Symantec
4 about the software. *See* Second Amended Complaint ¶ 49. Plaintiff then presented this analysis
5 to Symantec, and the parties began negotiating a potential resolution to the dispute. *See* ECF No.
6 71 at 5. The parties attempted to settle the case through mediation prior to the filing of the
7 lawsuit with retired judge Ronald Sabraw at JAMS on January 3, 2012, but were unable to reach
8 a resolution at that juncture.

9 Repeated Challenges to the Viability of Plaintiff's Claims. Following the unsuccessful
10 January 3, 2012, mediation, Plaintiff filed his complaint in this Court on January 10, 2012, and
11 the parties litigated the case for several months. During that time, Symantec filed three motions
12 to dismiss: the first resulting in Plaintiff's voluntary withdrawal of the original complaint, the
13 second resulting in the Court's dismissal of Plaintiff's First Amended Complaint, and the third
14 seeking dismissal of the Second Amended Complaint. *See* ECF Nos. 28, 32, 34, 49, 51. After
15 Symantec's Motion to Dismiss the Second Amended Complaint had been fully briefed, the
16 parties decided to attempt to resolve the lawsuit through a second round of mediation.

17 The Parties' Second Mediation. The parties held their second mediation on November 12,
18 2012 with John B. Bates of JAMS. Ultimately, the parties reached agreement on the following
19 monetary terms: a \$9.00 benefit to each class member that submitted a claim form and an
20 attorney fee award of up to \$1.65 million. Plaintiff's acceptance of the Settlement's monetary
21 terms was conditioned on Symantec also agreeing to injunctive relief and providing an in-kind
22 benefit to all class members regardless of whether they submitted a claim form. It took several
23 months after the second mediation for the parties to finalize the non-monetary benefits of the
24 Settlement. Symantec ultimately agreed to provide the requested three months of free Norton
25 AntiVirus to all class members and to provide the requested injunctive relief.

26 Amending the Settlement to Satisfy the Court's Concerns at Preliminary Approval. At
27 the preliminary approval hearing, the Court noted that the parties were forthright about an
28 expected low claims rate, and the Settlement provided for a maximum plaintiff's counsel fee

1 award (\$1.65 million) with any un-awarded fees to revert back to Symantec. Referring to *In re*
2 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), the Court suggested it
3 would be appropriate for Symantec to take on additional settlement liability should the maximum
4 \$1.65 million in requested fees not be awarded to plaintiff's counsel. Consequently, Symantec
5 agreed to forfeit a reversion of any un-awarded fees. The parties amended the Settlement
6 agreement to disburse to appropriate *cy pres* recipients any un-awarded portion of the \$1.65
7 million maximum allowable fee award. ECF No. 68-1. With this amendment, the Court granted
8 preliminary approval on May 28, 2013.

9 The Parties' Conference with Judge Corley to Amend the Settlement Again. Ultimately,
10 the total claim forms submitted by class members amounted to a claims rate of approximately
11 0.16% (the same approximate claims rate obtained in a similar class action before Magistrate
12 Judge Corley, *Lagarde v. Support.com*, 2013 WL 1283325 at *4). Citing concerns about the
13 amount of the fee award sought by Plaintiff's counsel (\$1.65 million) and the corresponding low
14 total monetary payout to the class in light of the final claims rate by class members, the Court—
15 at the suggestion of Plaintiff's counsel—referred the parties to Magistrate Judge Corley for a
16 settlement conference to determine whether an amended settlement could be reached. The parties
17 held a telephone conference with Judge Corley on October 24, 2013 and an in-person settlement
18 conference with her on December 10, 2013, resulting in amendments to the Settlement.

19 The Revised Settlement Provides Additional Minimum Monetary Benefits to the Class.
20 With the assistance of Judge Corley, the parties agreed to amend the Settlement to provide more
21 monetary consideration from Symantec and fee award concessions by Plaintiff's counsel.
22 Symantec has now agreed to make a minimum payment of \$1.25 million to the Class in the form
23 of a *cy pres* distribution—regardless of the number of claims submitted by class members and
24 regardless of any fee award to Plaintiff's counsel—and to the extent the Court awards less than
25 Class Counsel's requested fee award of \$700,000, Symantec would make an additional payment
26 to the *cy pres* distribution equal to the portion of requested fees that are not awarded by the
27 Court. This new commitment will result in Symantec paying 244% more than it would have
28 paid under the parties' original settlement agreement, with the Class receiving 7,453% more in

1 direct and *cy pres* monetary benefits, and Class Counsel agreeing to seek 58% less in fees.^{3 4}

2 Therefore, the amended settlement directly addresses the concerns expressed by the Court.

3 **VI. THE LACK OF ANY OBJECTORS OR INTERVENERS EVIDENCES THAT**
 4 **THE SETTLEMENT SHOULD BE APPROVED**

5 The final two factors to be considered—“the presence of a governmental participant; and
 6 the reaction of the class members to the proposed settlement”—both favor approval of the
 7 Settlement because potential government law enforcement authorities and absent class members
 8 were given notice of the Settlement and an opportunity to object, but none have expressed any
 9 interest in challenging this fair settlement. “[T]he fact that the overwhelming majority of the
 10 class willingly approved the offer and stayed in the class presents at least some objective positive
 11 commentary as to its fairness.” *Hanlon*, 150 F.3d at 1027. Moreover, “[i]t is established that the
 12 absence of a large number of objections to a proposed class action settlement raises a strong
 13 presumption that the terms of a proposed class settlement action are favorable to the class
 14 members.” *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007). “By any
 15 standard, the lack of objection of the Class Members favors approval of the Settlement.” *Id.*
 16 (citing *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with
 17 45 objections out of 90,000 notices sent)).

18 Here, undoubtedly because of the benefits offered by the Settlement, there have been no
 19 objections to the Settlement from the Class. Notice of the Settlement was also provided to all
 20 federal and state attorneys general, yet none have come forward to intervene or object to the
 21 Settlement. And only six of the more than one million class members have decided to opt out of
 22 the Settlement.

24 ³ Under the original settlement, and assuming the Court had awarded the entire fee award
 25 Plaintiff’s counsel is now seeking, the actual payout by Symantec would have totaled about
 26 \$869,500 (\$700,000 fee award, \$2,500 named plaintiff incentive award, \$17,000 direct benefit to
 27 the 1,800 class members that filed claims, and \$150,000 in administrative costs). Under the
 revised settlement, with an additional \$1.25 million *cy pres* payment, Symantec’s payout will be
 more than \$2.1 million.

28 ⁴ If the Court awards less than the full \$700,000 fee award requested by Plaintiff’s counsel,
 the percentage increase in benefits to the class over the original settlement would be greater.

Although the number of class members that submitted claims to receive the \$9.00 benefit was low, such a claims rate is not abnormal in cases involving low-cost products and/or relatively small alleged damages and does not preclude approval of a settlement, especially where substantial monetary and in-kind benefits are offered to every class member and coupled with a substantial *cy pres* payment. *See, e.g., Lagarde v. Support.com, Inc.*, No. 12-609 JSC, 2013 WL 1283325 (N.D. Cal. Mar. 25, 2013) (approving settlement despite 0.17% claims rate “since the settlement amount is commensurate with the strength of the class’ claims and their likelihood of success absent the settlement”); *Fraley v. Facebook, Inc.*, No. 11-1726 RS, 2013 WL 4516806 (N.D. Cal. Aug. 26, 2013) (approving settlement despite 0.4% claims rate because “the settlement as a whole provides fair, reasonable, and adequate relief to the class, in light of all the circumstances, including the low probability that a substantially better result would be obtained through continued litigation”); *In re Apple iPhone 4 Prods. Liab. Litig.*, No. 10-2188 RMW, 2012 WL 3283432, at *2 (N.D. Cal. Aug. 10, 2012) (approving settlement despite 0.16%-0.28% claims rate); *Parker v. Dish Network LLC*, No. 11-01457 PJH, ECF No. 70, at *1 (N.D. Cal. Mar. 9, 2012) (approving settlement despite 0.8% claims rate); *Touhey v. United States*, No. 08-1418, 2011 WL 3179036 (C.D. Cal. July 25, 2011) (approving settlement despite 2% claims rate because “there were no objections to the proposed settlement, nor any requests to opt out” and “the proposed recovery under the Settlement Agreement is fair”).

VII. CONCLUSION

Because all relevant factors favor approval of the Settlement, the Court should grant final approval of this fair, adequate, and reasonable Settlement.

Dated: February 21, 2014

WILSON SONSINI GOODRICH & ROSATI
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